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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JUDGE TERRY J. HATTER, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case concerns Congress's actions to bring federal judges within the Medicare hospital insurance (HI) program and Social Security old-age, survivors, and disability insurance (OASDI) program by extending coverage under those programs, as well as the taxes financing those programs, to the employment of Article III judges. The questions presented are:

1. Whether Congress violated the Compensation Clause, U.S. Const. Art. III, § 1, when it extended the taxes financing the HI and OASDI programs to the judicial salaries of respondents, who were sitting Article III judges at the time those taxes were first applied to judicial salaries.

2. Whether any constitutional violation ended when Congress increased the statutory salaries of federal judges in an amount greater than the amount of HI and OASDI taxes deducted from respondents' judicial salaries.

PARTIES TO THE PROCEEDINGS

Petitioner United States was the defendant in the Court of Federal Claims and the appellee in the court of appeals.

Respondents, who were plaintiffs in the Court of Federal Claims and appellants in the court of appeals, are Judges Terry J. Hatter, Jr., Peter H. Beer, Dudley H. Bowen, Jr., A.J. McNamara, Harry Pregerson, Raul A. Ramirez, Norman C. Roettger, Jr., Thomas A. Wiseman, Jr., Terence T. Evans, Henry A. Mentz, Jr., Wilbur D. Owens, Jr., Henry R. Wilholt, Jr., Harold A. Baker, and Michael M. Mihm, as well as Dolores Lee Burciaga as executrix of the estate of the late Judge Juan G. Burciaga, and Mary Martin Arceneaux on behalf of the late George Arceneaux, Jr.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The initial decision of the United States Claims Court (predecessor to the Court of Federal Claims), dismissing this case for lack of jurisdiction (App. 12a-18a),[1] is reported at 21 Cl. Ct. 786. The decision of the court of appeals reversing that dismissal (App. 19a-29a) is reported at 953 F.2d 626. The decision of the Court of Federal Claims on remand, dismissing respondents' constitutional claims on the merits (App. 30a-53a), is reported at 31 Fed. Cl. 436. The decision of the court of appeals reversing that dismissal and ruling in favor of respondents on the merits (App. 54a-66a) is reported at 64 F.3d 647. The decision of this Court, affirming the decision of the court of appeals under 28 U.S.C. 2109 because

[1] "App." refers to the separately bound appendix to this petition.

of the lack of a quorum (App. 69a), is reported at 519 U.S. 801.

The further decision of the Court of Federal Claims on remand, ruling in favor of the United States on the issues of damages and the statute of limitations but awarding some respondents limited relief (App. 70a-111a), is reported at 38 Fed. Cl. 166. The opinion of the panel of the court of appeals reversing the Court of Federal Claims insofar as it ruled in favor of the United States on damages (App. 112a-127a) is reported at 185 F.3d 1356. The order of the court of appeals vacating the panel's judgment and ordering rehearing en banc on the issue of the statute of limitations (App. 128a-129a) is reported at 199 F.3d 1316. The opinion of the en banc court of appeals, reversing the Court of Federal Claims on both damages and the statute of limitations (App. 1a-11a), is reported at 203 F.3d 795.

JURISDICTION

The judgment of the en banc court of appeals was entered on February 9, 2000. On May 2, 2000, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including June 8, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Reprinted in an appendix to this petition (App. 130a-132a) are the Compensation Clause, U.S. Const. Art. III, § 1, and pertinent provisions of 26 U.S.C. 3101 and 3121.

STATEMENT

1. More than 90% of the paid civilian labor force is engaged in employment covered by the Social Security old-age, survivors, and disability insurance (OASDI) program and the Medicare hospital insurance (HI) program. Employees earn credits based on their employment towards eligibility for OASDI and HI benefits and pay taxes on their wages

or salaries to finance those programs.[2] Before 1983, however, the employment of Article III judges, as well as almost all other federal employees, was excluded from the HI and OASDI programs. Instead, most employees of the Legislative and Executive Branches were required to contribute to the Civil Service Retirement System (CSRS) to obtain a retirement immunity. See 5 U.S.C. 8331 *et seq.* Article III judges were (and are) entitled to retire after meeting certain age and service requirements, and to receive lifetime annuities equal to their salary at the time of retirement. See 28 U.S.C. 371(a). Article III judges (like other federal employees) could qualify for OASDI and HI benefits on the basis of their prior employment outside the federal system, but they could not receive credits for either program based on their federal employment, nor were they subject to OASDI or HI taxes on their federal judicial salaries.

On January 1, 1983, employees in all three Branches of government first began to earn credits for Medicare HI coverage on the basis of their federal employment, and also first became subject to the HI tax on their salaries. One year later, on January 1, 1984, federal employees began to earn credits for Social Security old-age benefits on the basis of their federal service, and also became subject to the OASDI tax on their salaries.[3] The 1983 and 1984 amend-

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[2] Eligibility for HI benefits, in general, is tied to eligibility for Social Security old-age benefits. See 42 U.S.C. 426(a)(2)(A). Eligibility for old-age benefits is based on an individual's having paid OASDI taxes for 40 "quarters of coverage." See 42 U.S.C. 402(a), 414(a)(2). "Quarters of coverage" is tied to payment of "wages," which is defined in terms of remuneration for "employment." See 42 U.S.C. 409(a) (Supp. IV 1998), 413(a)(2)(A).

[3] The taxes on employees' wages that finance in part the OASDI and HI programs are imposed by 26 U.S.C. 3101(a) and (b) (1994 & Supp. IV 1998). Both Sections impose a tax on wages with respect to "employment," as defined in 26 U.S.C. 3121(b). Section 3121(b) and a companion provision, Section 3121(u), have undergone several changes

ments also imposed HI and OASDI taxes for the first time on the salaries of the President, Vice President, cabinet members, political appointees in the Senior Executive Service, Members of Congress, and all new Executive and Legislative Branch employees, as well as any then-current

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relevant to this case. Before September 3, 1982, Section 3121(b) excluded from the definition of "employment" "service performed in the employ of the United States * * * if such service is covered by a retirement system established by a law of the United States." 26 U.S.C. 3121(b)(6)(A) (1976). That provision exempted Article III judges from the HI and OASDI taxes, because those judges were (and are) covered by another retirement system established by 28 U.S.C. 371, which permits judges to retire from active service on annuity or full salary.

Congress extended the HI tax to federal judges' salaries in the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, Tit. II, Subtit. E, Pt. III, § 278, 96 Stat. 559-563. TEFRA added a new Section 3121(u)(1)(A), which provided that, "[f]or purposes of the [Medicare hospital insurance tax] imposed by section 3101(b) * * * paragraph (6) of [26 U.S.C. 3121(b)] shall be applied without regard to subparagraph[] (A) * * * thereof." 26 U.S.C. 3121(u)(1)(A) (1982); see 96 Stat. 559. TEFRA, in effect, instructed that the exclusion of federal judges' salaries from the definition of "employment" should be disregarded for purposes of the HI tax, and thus extended that tax (but not the OASDI tax) to judges' salaries.

Congress extended the OASDI tax to judges' salaries in the Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65, which again amended 26 U.S.C. 3121. The Social Security Amendments redefined "employment" in Section 3121(b)(5) generally to exclude "service performed in the employ of the United States," but also excluded from that exclusion service performed by federal judges, among others. See Pub. L. No. 98-21, § 101(b)(1), 97 Stat. 70. In addition, the Social Security Amendments amended Section 3121(u) to provide that, for the purpose of the Medicare tax, Section 3121(b) "shall be applied without regard to paragraph (5) thereof." See Pub. L. No. 98-21, § 101(b)(2), 97 Stat. 71. Because the Social Security Amendments excluded service by federal judges from the federal-employment exclusion from the general definition of "employment," it subjected federal judges to the HI and OASDI taxes of Section 3101, which fall on all wages in respect of employment, unless excluded. Because the same Act directed that the exclusion of federal employees in Section 3121(b)(5) be disregarded for HI tax purposes, it again brought federal employees, including judges, within the coverage of the HI tax.

federal civil service employees not participating in the CSRS. Those employees remain subject to HI and OASDI taxes today. See 26 U.S.C. 3121(b)(5) (1994 & Supp. IV 1998).

Congress brought federal employees, including federal judges, within the HI and OASDI systems in part out of concern that those employees were not paying their fair share of the cost of financing those benefit programs. When Congress in 1982 enacted legislation to bring federal employees within the HI system, the Senate Finance Committee noted as follows:

> Many active Federal civilian employees have worked long enough (or their spouses have) in employment covered by social security to become insured under the Hospital Insurance program. However, while most workers in covered social security employment are subject to the Hospital Insurance tax throughout their entire working careers, Federal employees may earn the same coverage with relatively fewer years of work subject to the tax. The committee believes that Federal workers should bear a more equitable share of the costs of financing the benefits to which many of them eventually become entitled.
>
> The bill, therefore, extends Medicare coverage to all members of the Federal workforce in the same way coverage is provided to most other workers.

Vol. I, S. Rep. No. 494, 97th Cong., 2d Sess. 378 (1982). Similarly, when Congress in 1983 enacted legislation to bring many federal employees (including federal judges) within the Social Security old-age benefit system, the House Ways and Means Committee observed that the expansion of coverage to include "several groups of workers previously excluded from participation in the program" was intended to "maintain the social security program on a sound financial basis"

and to "assur[e] both the short-term and long-term financial stability of the program." H.R. Rep. No. 25, 98th Cong., 1st Sess. 3 (1983).

2. On December 29, 1989, eight federal judges[4] (the "early-filing judges") filed suit against the United States in the United States Claims Court (predecessor to the Court of Federal Claims), contending that Congress had unconstitutionally diminished their compensation in violation of the Compensation Clause, U.S. Const. Art. III, § 1, when, on January 1, 1984, it made their judicial salaries subject to the OASDI tax.[5] Those eight judges were all sitting judges as of January 1, 1984, when the OASDI tax first became applicable to judicial salaries. The judges did not contend that Congress had diminished their prescribed statutory salary. Rather, they contended that the incidence of the OASDI tax on their salary on January 1, 1984, effectively and unconstitutionally diminished that salary, and that the unconstitutional diminution continued to the present day, despite substantial salary increases received by those judges after January 1, 1984.[6]

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[4] Those eight judges were District Judges Hatter, Arceneaux, Beer, Burciaga, McNamara, Ramirez, and Wiseman, and Circuit Judge Pregerson. District Judges Bowen and Roettger were also plaintiffs in the original suit, but did not appeal from the adverse decision of the United States Claims Court. After the court of appeals reversed and remanded, however, Judges Bowen and Roettger rejoined the lawsuit, when several other judges also became plaintiffs. For statute of limitations purposes, Judges Bowen and Roettger are grouped with the "later-filing judges." See p. 7, *infra*.

[5] The Compensation Clause provides:

> The Judges, both of the supreme and inferior Courts, * * * shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

[6] From December 17, 1982, to December 31, 1983, just before Congress extended the OASDI tax to federal judges, circuit judges were paid an annual salary of $77,300, and district judges were paid an annual salary of $73,100. See Exec. Order No. 12,387, 47 Fed. Reg. 44,981 (1982). In 1984, after OASDI taxes were first imposed upon judicial salaries, the annual salaries of circuit judges were raised to $80,400, and those of district judges were raised to $76,000. Exec. Order No. 12,456, 49 Fed. Reg. 347 (1983), as amended by Exec. Order No. 12,477, 49 Fed. Reg. 22,041 (1984), and Exec. Order No. 12,487, 49 Fed. Reg. 36,493 (1984). Although the Executive Order increasing judges' salaries in 1984 was promulgated on September 1, 1984, the increase in judges' salaries was made retroactive to the first date of the first applicable pay period commencing on January 1, 1984. *Ibid.*; see App. 86a.

Since that time, federal judges have received additional salary increases. Circuit judges currently receive $149,900 annually, and district judges receive $141,300. See Exec. Order No. 13,144, 64 Fed. Reg. 72,242 (1999); see generally 28 U.S.C. 44 and 135, Historical Notes (describing salary increases from 1919 for circuit judges and district judges, respectively).

The Claims Court initially dismissed the suit for lack of jurisdiction on the ground that the judges had not filed administrative tax refund claims. App. 12a-18a. The court of appeals reversed, and ruled that the Claims Court had jurisdiction under the Tucker Act, 28 U.S.C. 1491(a)(1), notwithstanding the judges' failure to file tax refund claims. App. 19a-29a. The court of appeals reasoned that the judges "did not pursue a tax refund. Instead they sought damages for a violation of Article III, § 1—an action which is within the Tucker Act jurisdiction of the Claims Court." App. 26a. The court of appeals remanded the case for further proceedings.

3. On remand, the plaintiffs filed two amended complaints, which added eight judges (the "later-filing judges") as new plaintiffs.[7] The second amended complaint, filed on January 11, 1993, also challenged for the first time (on behalf of all respondents) the constitutionality of the HI tax, which was first imposed on judicial salaries on January 1, 1983. The parties cross-moved for summary judgment, and the Court of Federal Claims granted summary judgment for the United States, concluding that the application of the OASDI

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[7] The eight new plaintiffs were, in addition to District Judges Bowen and Roettger (who rejoined the case after the remand, see p. 6, n.4, *supra*), District Judges Evans, Mentz, Owens, Wilhoit, Baker, and Mihm.

and HI taxes to respondents' judicial salaries was constitutional. App. 30a-53a.

4. The court of appeals reversed, and held that Congress's extension of the HI and OASDI taxes to the salaries of already-sitting federal judges violated the Compensation Clause. App. 54a-66a. The court found this case controlled by *Evans* v. *Gore*, 253 U.S. 245 (1920), which held that the Clause prohibited the imposition of the federal income tax on the salaries of sitting federal judges. App. 59a. The court acknowledged (App. 59a-60a) that this Court's subsequent decision in *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939), had upheld the application of the income tax to the salaries of federal judges who took office after the income tax was enacted. It also noted (App. 60a) that this Court stated in *United States* v. *Will*, 449 U.S. 200, 227 n.31 (1980), that *O'Malley* had "undermine[d] the reasoning of *Evans*." Nonetheless, the court of appeals concluded that this Court had never directly overruled *Evans*. Following the Court's admonitions that, "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls," and that the lower courts must "leav[e] to this Court the prerogative of overruling its own decisions," the court of appeals concluded that "*Evans* governs this case more directly than *O'Malley*." App. 60a-61a (quoting *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). It therefore remanded the case for a determination of the amount in which the HI and OASDI taxes had diminished respondents' compensation. App. 65a-66a.

5. The United States filed a petition for a writ of certiorari. Four Justices recused themselves from consideration of the petition. Because of those recusals, the Court lacked the necessary quorum of six Justices. See 28 U.S.C. 1. The Court therefore entered an order under 28 U.S.C. 2109, which provides that, when a quorum of the

Court is absent and a majority of the qualified Justices are of the opinion that the case cannot be heard at the next ensuing Term, the judgment of the court of appeals shall be affirmed with the same effect as an affirmance by an equally divided Court. See App. 69a.

6. On remand from the Federal Circuit, the Court of Federal Claims ruled that all the claims of the later-filing judges (see p. 7, *supra*) and all the respondents' claims based on the HI tax were barred by the six-year statute of limitations for actions against the United States (see 28 U.S.C. 2401(a) and 2501). App. 90a-105a. The court also ruled, as to the early-filing judges' claims based on the OASDI tax, that any constitutional violation had come to an end when Congress granted judges a salary increase that offset the OASDI tax applied to their salaries on January 1, 1984. App. 82a-89a. The court found a violation of the Compensation Clause only in the amount of OASDI tax imposed on the early-filing judges' salaries in their January 1984 salary payment. App. 77a.[8]

a. With respect to the statute of limitations, the court held that the HI claims and all the claims of the later-filing judges were filed more than six years after those claims had accrued, and rejected respondents' arguments that those claims were timely filed under the "continuing claim" doctrine. App. 101a-105a. The court questioned whether the continuing claim doctrine still exists at all, see App. 103a, but it did not resolve that question, for it concluded that doctrine would not govern the claims in this case in any event. The

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[8] Judges are paid on the first day of each calendar month for services rendered during the previous month, and so the OASDI tax deducted from the judges' salary payments on January 1, 1984, was in fact a tax on their salaries earned during December 1983. App. 77a. The court ordered judgment in the amount of the OASDI tax deducted from judges' salaries on January 1, 1984—$328.95 for the seven early-filing district judges and $347.85 for the early-filing circuit judge—with compound interest. App. 77a, 110a-111a.

court noted that the continuing claim doctrine "provides that when the government owes a plaintiff a continuing, recurring duty to make payments of money, a new cause of action arises with each breach of that duty." App. 101a. But, the court stated, that doctrine does not apply here, where "the unlawful diminution consisted of imposition of two new taxes on specific effective dates." App. 105a. Those dates (January 1, 1983 and January 1, 1984), the court held, were the dates on which respondents' claims accrued.

b. The court also agreed with the government that statutory increases in judges' nominal annual salaries[9] in 1984 and thereafter had terminated the constitutional violation caused by the initial incidence of the OASDI tax on respondents' salaries. App. 78a-89a. The court began by observing that, "if, simultaneously with the imposition of a new tax, Congress granted an increase in salary which equaled or exceeded the tax, no diminution in the level of compensation just prior to imposition of the tax would have occurred." App. 79a. If that is so, the court reasoned, then any constitutional violation caused by the imposition of a new tax must also terminate when Congress raises judges' salaries "in an amount equal to or greater than the amount of the tax. * * * [I]f an increase in nominal salary occurred simultaneously with or subsequent to * * * a diminution, the simultaneous or subsequent increase accomplishes a cure to the extent of such increase." App. 82a.[10]

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[9] The court defined "nominal annual salary" as "the stated lawful salary before deduction of federal and state income taxes, Social Security taxes and voluntary items." App. 86a & n.10.

[10] Otherwise, the court noted, Congress could never bring to an end a violation of the Compensation Clause caused by the initial application of a new tax except by repealing the tax (or specifically granting the affected judges a salary increase to compensate for the tax). The court observed that respondents had effectively argued that even "if Congress awarded all judges a pay raise of $1,000,000 per year retroactive to January 1, 1983 but not specifically or expressly related to the Social Security taxes imposed in 1983 or 1984, it would not cure the diminution resulting from

The court found that Congress had in fact raised judges' salaries in an amount greater than the OASDI tax imposed on those salaries on January 1, 1984. App. 86a-87a. It also calculated that judges' salary increases over the pre-1984 compensation base exceeded in each year the total amount that judges paid in HI and OASDI taxes in that year, until by 1993, the annual sums represented by the successive pay increases "are more than ten times higher than the total of Social Security taxes withheld during any calendar year." See App. 89a. Based on those facts, the court concluded that "no unlawful diminution in judicial compensation occurred" after respondents' salary increase in 1984 took effect. See App. 89a.

7. A panel of the court of appeals reversed the trial court's conclusion that the constitutional violation terminated upon the judges' first salary increase following the initial incidence of the OASDI tax, App. 116a-125a, but affirmed the dismissal of the HI tax and later-filing judges' claims as time-barred, App. 125a-127a.

On the former point, the court of appeals rejected the trial court's conclusion that no unconstitutional diminution in judicial compensation continues once Congress offsets a newly-levied tax by a general increase in judicial salaries that equals or exceeds the amount of the new tax. The court of appeals explained that it rejected the trial court's approach because, in the court's view, it "would create, with regard to judicial compensation, two different classes of judges." App. 122a. As the court of appeals put the matter, if the trial court's conclusion were upheld, then those judges who took office after Congress extended HI and OASDI taxes to sitting judges could enjoy "the full benefit of con-

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imposition of the taxes. Under [respondents'] theory, all Social Security taxes withheld must be refunded to [respondents] and there can absolutely be no cure by subsequent increases in salary" granted to all federal judges. App. 83a-84a.

gressionally-granted salary increases" subsequent to those dates. App. 122a. On the other hand, those judges who took office before HI and OASDI taxes were applied to judicial salaries "would not receive the Congressionally-granted salary increases which became effective after 1983, because a significant portion of the increases would be allocated to pay the damage award to which they are entitled as a result of the earlier unconstitutional imposition." *Ibid.* The court also remarked that Congress had granted federal judges salary increases to adjust for inflation, and that "[t]o deprive the pre-1983 judges of the benefit of those increases by using them to offset the losses they incurred from the Government's earlier wrongful act would not only be unfair, but would be contrary to Congress's purpose in granting the increases." App. 125a. Thus, it held, any determination of the duration of a violation of the Compensation Clause and any calculation of damages must be "independent of any generally awarded adjustment to judicial salaries." *Ibid.*

8. Both the United States and respondents sought rehearing and rehearing en banc. The court denied the United States' petition. It granted respondents' petition, which sought rehearing en banc of the panel's decision affirming the dismissal of the HI tax clams and later-filing judges' claims as time-barred, and vacated the judgment of the panel. App. 128a-129a.

On rehearing en banc, the court held that, under the continuing claim doctrine, all of respondents' OASDI and HI claims were timely filed. App. 2a-11a. The court relied on *Friedman* v. *United States*, 159 Ct. Cl. 1 (1962), in which its predecessor, the Court of Claims, had sought to summarize the rules governing the accrual of claims in situations involving a series of periodic payments from the government. Under *Friedman*, the court stated, the continuing claim doctrine governs accrual of claims for payment that (a) need not be determined in the first instance by a federal agency, and (b) turn either on pure issues of law or on "sharp and

narrow" factual issues. App. 4a-6a. In such cases, the court held, a claim accrues anew each time the government incurs an alleged obligation to make a payment to the claimant. The court found respondents' claims in this case to fall within that category because "[n]o administrative officer or tribunal was given discretion to decide whether the judges were entitled not to pay" HI and OASDI taxes, and because the constitutionality of the application of HI and OASDI taxes to sitting judges' salaries involves a pure question of law. App. 7a.[11] The en banc court at that time also reinstated the judgment of the panel, which had reversed the Court of Federal Claims, and reinstated the panel's decision insofar as it had reversed the trial court's determination that the Compensation Clause violation came to an end when Congress granted judges a general salary increase. See App. 1a-2a.

REASONS FOR GRANTING THE PETITION

The court of appeals has held unconstitutional, as applied to federal judges appointed before January 1, 1983 and 1984, Acts of Congress that extended to federal employees the taxes financing the Medicare hospital insurance (HI) and

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[11] The court rejected the view that the continuing claim doctrine does not apply to this case because it involves a claim based on a "single distinct event, which may have ill effects later on." App. 9a. The court stated that that language (which was drawn from one of its earlier decisions) was "simply descriptive of the type of case that falls outside the continuing claim doctrine," and did not purport to fix the distinguishing line between cases that call for application of the continuing claim doctrine and those that do not. *Ibid.* The court also disclaimed reliance on other statements in its earlier decisions that had found the continuing claim doctrine not to apply when "all necessary events had occurred" at an earlier time, or unless the claim was "inherently susceptible of independent and distinct events or wrongs." App. 11a. Such statements, the court concluded, "may be accurate ways of describing the events after-the-fact, but they do not contribute to the analysis" of the applicability of the continuing claim doctrine, which is henceforth to be governed exclusively by the *Friedman* factors. *Ibid.*.

Social Security old-age, survivors, and disability insurance (OASDI) programs. Almost every other wage and salary earner in this country is also required to pay those taxes, and they are tied to credits for coverage under the HI and OASDI programs, which Congress extended to judges when it also extended the taxes to their salaries. The court of appeals believed itself bound by this Court's decision in *Evans* v. *Gore*, 253 U.S. 245 (1920), to conclude that the extension of a tax to the salaries of federal judges is a diminution of those judges' compensation in violation of the Compensation Clause, even though it recognized that subsequent decisions of this Court have severely undermined *Evans*. That decision warrants review by this Court because it holds two Acts of Congress unconstitutional based on discredited authority that is inconsistent with the purposes of the Compensation Clause and should be definitively overruled.

The adverse effects of the court of appeals' ruling on the merits are exacerbated by its further decision rejecting the government's argument that any Compensation Clause violation has come to an end. The court of appeals held that the unconstitutional diminution of the judges' salaries caused by the taxation of those salaries continued even after Congress raised those salaries above the level at which they had been before the taxes were first applied to judges. In effect, the court has held that Congress can never terminate an unconstitutional diminution of judges' salaries caused by taxation, except by repealing the taxation of the judges' salaries entirely, or by granting a special salary increase only to the class of judges who were appointed before the tax took effect (thereby creating two classes of judges compensated differently). The court's decisions seriously impair Congress' ability to subject judges' salaries to nondiscriminatory forms of income tax.

Although no other circuit has considered the precise issues presented in this case, the Federal Circuit and the

Court of Federal Claims are courts of nationwide jurisdiction.[12] Further, the court of appeals has effectively held that the constitutional violation caused by extension of the HI and OASDI taxes to a sitting judge's salary continues as long the judge continues to draw a salary that was once supposedly diminished by those taxes. Any federal judge, therefore, who held a judicial position before January 1, 1984, and still held the same position as of six years ago may now challenge the HI and OASDI taxes by filing suit in the Court of Federal Claims to gain the benefit of the court of appeals' decision in this case.[13] Several other federal judges have, in fact, filed such lawsuits.[14]

This Court should grant review to resolve definitively a matter of considerable importance touching on the relations between the Legislative and Judicial Branches. This Court's review is particularly important because the court of appeals believed that it had no authority to depart from this Court's decision in *Evans* v. *Gore*. Thus, absent review by this Court, *Evans* v. *Gore* will become fixed as the law of the land

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[12] A related issue, which has arisen in the Eleventh Circuit, concerns whether the Compensation Clause bars the application of a county occupation tax to the salaries of federal judges who were appointed before the tax was enacted (but after state law authorized the county to impose such a tax). The Eleventh Circuit recently held that tax valid. *Jefferson County* v. *Acker*, 210 F.3d 1317, 1321-1322 (2000). The Eleventh Circuit noted that it was "unpersuaded" by the reasoning of the Federal Circuit in this case. *Id.* at 1321 n.5.

[13] The limitation period for civil actions against the United States is six years after the accrual of the claim. See 28 U.S.C. 2401(a). Thus, any judge who either retired or was appointed to a new judicial position at least six years ago would no longer have a cause of action to recover the taxes that had been deducted from that judge's old salary. Federal judges who were appointed to a new judicial position after the 1984 salary increase took effect would not have a claim based on the taxes deducted from their new salaries, because the salaries would already have been subject to HI and OASDI tax at the time of the new appointment.

[14] In appendix to this petition (App. 133a-136a) we have attached a list of the other pending lawsuits and our most current information regarding the federal judges who have joined those lawsuits.

on the permissibility of taxation of federal judges' salaries, even though this Court long ago disapproved the reasoning of that decision.

1. a. There is a threshold question whether a quorum of the Court is available to hear and decide this case. When the government filed its previous certiorari petition in this case, four Justices recused themselves, and so the Court did not have the necessary quorum of six Justices. See 28 U.S.C. 1. Because of the lack of a quorum, the Court entered an order under 28 U.S.C. 2109, affirming the decision of the court of appeals.

The Justices who recused themselves from considering our prior petition did not state reasons for their recusals. It appears, however, that the recusing Justices already held a judicial position on the dates that Congress extended the HI and OASDI taxes to judges' salaries, and either (a) retained that same judicial position when our prior certiorari petition was before the Court, or (b) had been appointed to a new judicial position after the taxes were extended to judicial salaries, but less than six years before our petition was before the Court.[15] The recusing Justices, therefore, may have perceived that they still potentially had a cause of action to challenge the HI and OASDI taxes that was not barred by the six-year statute of limitations for civil claims against the United States, see 28 U.S.C. 2401(a), and that that potential claim required their recusal under 28 U.S.C. 455(b)(4).[16]

[15] Conversely, the Justices who did not recuse themselves either (a) were not federal judges when Congress extended the HI and OASDI taxes to judges' salaries, or (b) had been appointed to a new judicial position more than six years before our prior petition was before the Court.

[16] Section 455(b)(4) provides that a judge or Justice shall disqualify himself when he knows that he "has a financial interest in the subject matter in controversy * * * or any other interest that could be substantially affected by the outcome of the proceeding."

As an initial matter, we note that the Rule of Necessity may permit all of the Justices to hear and decide this case, even if some Justices might have a potential claim that would otherwise suggest recusal under Section 455(b)(4). See generally *United States* v. *Will*, 449 U.S. 200, 213-216 (1981). This case involves fundamental matters touching on the relation between the Legislative and Judicial Branches, and in that sense it potentially affects all federal judges.[17] Moreover, the financial interest that a Justice might have in this case arises solely out of the emoluments of the judicial office, rather than out of matters that are personal to the individual Justice. It is therefore noteworthy that in the Court's three previous cases concerning the constitutionality of the application of the income tax to judicial salaries, the entire Court heard and decided those cases. See *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939); *Miles* v. *Graham*, 268 U.S. 501 (1925); *Evans* v. *Gore*, 253 U.S. 245 (1920); see also *Will*, 449 U.S. at 215 & n.18. *O'Malley* is particularly instructive in this regard, because the salaries of four of the Justices were subject to the income tax statute under review in that case, and the Court therefore would have been denied a quorum if they had recused themselves, and yet all the Justices participated.[18]

Moreover, if the Court cannot decide this case because of the lack of a quorum, the public will be denied the opportunity for an authoritative disposition on important questions concerning the constitutionality of two Acts of Congress. That point is particularly crucial here since the Federal

[17] That is especially true since the reasoning of the court of appeals' decision might suggest that Congress could not even raise the rate of existing income taxes on the salaries of sitting federal judges. See p. 28 n.26, *infra*.

[18] See *O'Malley*, 307 U.S. at 279 (noting that the tax applied only to salaries of judges taking office after June 6, 1932). Justices Black, Reed, Frankfurter, and Douglas took office after June 6, 1932. See *The Oxford Companion to the Supreme Court* 969 (Kermit L. Hall ed., 1992).

Circuit, a court of nationwide jurisdiction, believed itself bound to follow a decision of this Court (*Evans* v. *Gore*) that, it stated, remains controlling on lower courts unless and until it is definitively overruled by this Court, even though the court also acknowledged that that decision has been seriously undermined. Absent review by this Court, therefore, the Federal Circuit's decision following *Evans* will be the law of the land, even though (as we explain below) it is quite likely that *Evans* does not reflect this Court's current Compensation Clause jurisprudence. The Court has also explained that it is important that the federal courts be available to decide claims involving judicial compensation because "the Compensation Clause is designed to benefit, not the judges as individuals, but the public interest in a competent and independent judiciary." *Will*, 449 U.S. at 217. The public interest therefore strongly favors this Court's review of the Compensation Clause issues in this case.

In any event, it appears that, even if the Rule of Necessity is not applicable here, the necessary quorum may now be available. Since the time that our previous certiorari petition was before the Court, almost three years have passed. The six-year statute of limitations for actions against the United States may now bar any Compensation Clause claim based on the HI and OASDI taxes by some of the Justices who previously recused themselves, if they have not already joined one of the pending lawsuits challenging the HI and OASDI taxes (see p. 15, n.14, *supra*) or filed an administrative tax-refund claim with the Internal Revenue Service.[19]

[19] We are not aware that any Justice has joined one of the pending lawsuits. The court of appeals noted, however, that judges seeking to challenge the HI and OASDI taxes also had the option of pursuing administrative tax refund claims (although they were not required to do so). App. 26a. Because of statutes protecting the confidentiality of tax return information, see 26 U.S.C. 6103, we may not inquire of the IRS whether any judge or Justice has filed a tax refund claim. We note, however, that any administrative tax refund claim must be filed within two years after the tax is paid or three years after the tax return is filed, a period less generous than the six-year limitation period that has been applied in this case by the lower courts. See 26 U.S.C. 6511(a), 6513(c).

Because of the six-year statute of limitations, a Justice would not have a claim, and therefore would not have a potential financial interest suggesting recusal under Section 455(b)(4), if that Justice was appointed to his or her current judicial position between January 1, 1984 (the date on which Congress extended OASDI taxes to judicial salaries) and a date more than six years before the date on which the Court acts on this certiorari petition. Accordingly, circumstances that previously indicated recusal may no longer be present.[20]

b. If a quorum of the Court is present, another threshold issue is whether the "law of the case" doctrine prevents the Court from examining in plenary fashion the merits of the Compensation Clause issue that was presented to the Court in our prior certiorari petition.[21] We submit it does not. The order entered by the Court on our prior petition under 28 U.S.C. 2109 was an order affirming the judgment below "with the same effect as upon an affirmance by equally divided Court." App. 69a. But although such an order is denominated an affirmance, "this is only the most convenient mode of an expressing the fact that the cause is finally disposed of in conformity with the action of the court below, and that that court can proceed to enforce its judgment." *Durant* v. *Essex Co.*, 74 U.S. (7 Wall.) 107, 112 (1868); see *Neil* v. *Biggers*, 409 U.S. 188, 190-192 (1972) (holding that, for purposes of the federal habeas corpus statute, an affirmance by a tie vote is not an "actual adjudication" by this Court). Such an order does not establish precedent

[20] When this case was before the Court on our prior petition, respondents acknowledged (95-1733 Br. in Opp. 25, 27, 29) that any Justice who was appointed after January 1, 1984, but more than six years before the Court's consideration of the case was not disqualified from participating in the case.

[21] The issue of the date of the termination of the constitutional violation (pp. 26-29, *infra*), which was not before the Court in our prior petition, does not implicate the law of the case doctrine.

binding on this Court. See *United States* v. *Pink*, 315 U.S. 203, 216 (1942).

Nor does such an order prevent this Court from examining the issue in plenary fashion in the same case. The doctrine of law of the case generally provides that "a court should not reopen issues decided in earlier stages of the same litigation." *Agostini* v. *Felton*, 521 U.S. 203, 236 (1997). The law of the case doctrine thus promotes judicial efficiency, stability of the law, and respect for the courts' decisionmaking authority by discouraging parties from repeatedly challenging decisions that a court has already made. But a basic premise of the doctrine is that it prevents a court from reopening an issue only if the court actually decided that issue at an earlier stage of the litigation. See *Quern* v. *Jordan*, 440 U.S. 332, 347 n.18 (1979) ("The doctrine of law of the case comes into play only with respect to issues previously determined."). In this case, the Court did not actually decide the merits of the Compensation Clause issue when our prior petition was before it. Indeed, the Court as a Court did not even examine the merits of that issue, because a quorum was not present; the Court's judgment affirming the decision of the Federal Circuit was entered solely by operation of law. The policies supporting the law of the case doctrine, discouraging wasteful and pertinacious relitigation of issues that a court has thoroughly considered, do not apply in a situation like this.

The law of the case doctrine, moreover, "directs a court's discretion, it does not limit the tribunal's power." *Arizona* v. *California*, 460 U.S. 605, 618 (1983); see *Messenger* v. *Anderson*, 225 U.S. 436, 444 (1912). Rather, "[a] court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance." *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988). Law of the case does not prevent courts from reexamining earlier decisions that are "clearly erroneous and would work a manifest injustice." *Agostini*, 521 U.S. at 236. This is such a situation.

As we now explain, the court of appeals' invalidation of the extension of HI and OASDI taxes to judicial salaries rests entirely on a decision that interpreted the Compensation Clause in a manner that has been thoroughly discredited. That decision should now be definitively repudiated.

2. a. Congress did not violate the Compensation Clause when it extended HI and OASDI taxes to judicial salaries. In finding a constitutional violation, the court of appeals believed itself bound by this Court's decision in *Evans* v. *Gore*. In *Evans*, the Court held that the Compensation Clause barred the application of the income tax to federal judges' salaries. That decision should now be overruled.

Evans involved an income tax levied under a 1919 statute on the salary of a federal judge appointed in 1899 (see 253 U.S. at 246), but the opinion did not limit the holding to situations in which the judge's appointment predated the imposition of the tax. Rather, the majority relied (*id.* at 255) on intergovernmental tax immunity cases such as *Collector* v. *Day*, 78 U.S. (11 Wall.) 113 (1871), and *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), for the broad proposition that the Framers "were so sedulously bent on securing the independence of the judiciary [that they] intended to protect the compensation of the judges from assault and diminution in the name and form of a tax[.]" 253 U.S. at 256. On that premise, the Court concluded that a judge's "compensation is protected from diminution in any form, whether by a tax or otherwise, and is assured to him in its entirety for his support." *Id.* at 263.[22]

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[22] Justice Holmes, joined by Justice Brandeis, dissented, stating that the imposition of an income tax upon judges is constitutional as long as it does not single out judicial compensation but, rather, applies with like force to all citizens. Justice Holmes argued that the constitutional imperative of protecting judicial independence "is a very good reason for preventing attempts to deal with a judge's salary as such, but seems to me no reason for exonerating him from the ordinary duties of a citizen, which he shares with all others." 253 U.S. at 265. "To require a man to pay the taxes that all other men have to pay," he continued, "cannot possibly be

In *Miles* v. *Graham*, 268 U.S. 501 (1925), the Court relied on *Evans* to hold that the Compensation Clause barred the imposition of an income tax on the salary of a judge appointed after the enactment of the tax (see *id.* at 505). The Court concluded that the compensation was fixed by statute, "and to exact a tax in respect of this would diminish it within the plain rule of *Evans* v. *Gore*." *Id.* at 509.

Fourteen years later, however, the Court abandoned "the plain rule of *Evans* v. *Gore*" and embraced the view that judicial salaries are as subject to taxation in the same manner as the salaries of other citizens. In *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939), the Court, considering another attempt by Congress to require judges to pay income tax, held that "a non-discriminatory tax laid generally on net income is not, when applied to the income of a federal judge, a diminution of his salary within the prohibition" of the Constitution. *Id.* at 282. To subject judges to a general tax "is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering." *Ibid.*

O'Malley expressly overruled *Miles*. 307 U.S. at 282-283. It did not expressly overrule *Evans*, for Congress had structured the income tax act under review in *O'Malley* "to avoid, at least in part, the consequences of" *Evans* by making the tax applicable only to the salaries of judges appointed after its effective date. See *id.* at 280. The Court did, however, strongly disapprove the reasoning of *Evans*:

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made an instrument to attack his independence as a judge. I see nothing in the purpose of this clause of the Constitution to indicate that the judges were to be a privileged class, free from bearing their share of the cost of the institutions upon which their well-being if not their life depends." *Ibid.*

> [T]he meaning which *Evans* v. *Gore* imputed to the history which explains Article III, § 1, was contrary to the way in which it was read by other English-speaking courts. The decision met wide and steadily growing disfavor from legal scholarship and professional opinion. *Evans* v. *Gore* itself was rejected by most of the courts before whom the matter came after that decision.

307 U.S. at 281 (footnotes omitted).[23]

The Court reexamined *O'Malley*, *Miles*, and *Evans* in *United States* v. *Will*, *supra*. In *Will*, the Court held that Congress may not withdraw an increase in a statutorily prescribed judicial salary once it has gone into effect, but that Congress may cancel a prospective statutory salary increase before it takes effect. The Court disapproved the district court's reliance on *Evans* as a basis for holding that the rescission of a salary increase before its effective date reduces the amount of compensation that a judge has been promised. 449 U.S. at 200. Rather, the Court stated:

> In *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939), this Court held that the immunity in the Compensation Clause would not extend to exempting judges from paying taxes, a duty shared by all citizens. The Court thus recognized that the Compensation Clause does not forbid everything that might adversely affect judges. The opinion concluded by saying that to the extent *Miles* v. *Graham*, 268 U.S. 501 (1925), was inconsistent, it "cannot survive." 307 U.S. at 282-283. Because *Miles*

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[23] Justice Butler's dissent in *O'Malley* also noted that, "[e]vidently, the Court intends to destroy the decision in *Evans* v. *Gore*. Without suggesting that there is any distinction between that case and *Miles* v. *Graham*, it declares that the latter 'cannot survive.'" 307 U.S. at 297. The Eleventh Circuit also recently observed that this Court "had much to say in its *O'Malley* opinion about the *Evans* decision, and none of it was flattering." *Jefferson County*, 210 F.3d at 1319.

relied on *Evans* v. *Gore*, *O'Malley* must also be read to undermine the reasoning of *Evans*.

449 U.S. at 227 n.31.[24]

b. The court of appeals attempted to reconcile *Evans* and *O'Malley* by reading *Evans* to hold that Congress may not impose *new* taxes on the salaries of already-sitting federal judges (even if those taxes do not discriminate against judges), even though under *O'Malley*, "nondiscriminatory taxation of a judge who took office after the tax went into effect does not violate the Compensation Clause." App. 64a. The court's reasoning was that, in the former case, the already sitting judge's compensation is "diminished" by the effect of the new tax, while in the latter case, "the taxation formed part of that judge's compensation scheme from the outset of his tenure." *Ibid.* That interpretation of the Compensation Clause reflected in the court of appeals' opinion is erroneous: the Clause does not bar Congress from applying nondiscriminatory taxes to the salaries of already sitting federal judges. Because the court of appeals believed that its decision was compelled by the lingering precedential force of *Evans*, this Court should grant review to overrule *Evans* definitively, and make clear that the imposition of a nondiscriminatory tax on the salary of a federal judge does not unconstitutionally "diminish" that judge's compensation, whether the tax was enacted before or after the judge took office.

The Court in *Evans* relied on its earlier intergovernmental tax immunity decisions, as well the observation that "the power to tax carries with it the power to embarrass and destroy," to conclude that the Framers must have intended

[24] See also *Jefferson County*, 210 F.3d at 1320 (observing that "in *Will* the Supreme Court itself read *O'Malley* as undermining the reasoning in *Evans*, and it characterized the holding of *O'Malley* broadly, saying that the Compensation Clause did not exempt judges from paying the same taxes that other citizens paid").

"to protect the compensation of the judges from assault and diminution in the name or form of a tax[.]" 253 U.S. at 256 (internal quotation marks omitted). Those rationales have not survived closer scrutiny over time. The intergovernmental immunity cases on which the Court relied by analogy have been thoroughly repudiated. See *South Carolina* v. *Baker*, 485 U.S. 505, 520, 524 (1988) (overruling *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895)); *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466 (1939) (overruling *Collector* v. *Day*, 78 U.S. (11 Wall.) 113 (1871)); see also *Jefferson County* v. *Acker*, 527 U.S. 423, 436-437 (1999). In particular, in *Graves*, decided the same Term as *O'Malley*, the Court noted that the purpose of intergovernmental tax immunity is "not to confer benefits on [governmental] employees by relieving them from contributing their share of the financial support of the other government, whose benefits they enjoy * * * [,] but to prevent undue interference with one government by imposing on it the tax burdens of the other." 306 U.S. at 483-484. The Court held there that a nondiscriminatory state income tax that falls on federal employees as well as others does not "impose a burden on the national government tantamount to an interference by one government with the other in the performance of its functions." *Id.* at 480-481.

The Court's decisions since *Evans* also disavow the notion that the application of nondiscriminatory federal taxes to the salaries of federal judges implicates "the power to destroy" the federal judiciary, such that the Compensation Clause is violated. As the Court explained in *Will*, the purpose of the Clause is to secure "a truly independent judiciary, free of improper influence from other forces within government." 449 U.S. at 218. But the application of nondiscriminatory taxes to judicial salaries poses no threat to the constitutional value of judicial independence protected by the Clause. Rather, such nondiscriminatory taxation merely reflects the view, endorsed by this Court, that "judges are also citizens,

and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering." *O'Malley*, 307 U.S. at 282; see also *Will*, 449 U.S. at 226 ("Federal judges, like all citizens, must share the material burden of the government."). That is true whether Congress imposes an entirely new tax on the income of all citizens, including federal judges, or (as in this case) brings federal judges' salaries within the coverage of a tax that has long been applied to the vast majority of the paid labor force (and made judges eligible for the HI and OASDI programs based on their judicial service).[25]

3. The court of appeals also held that the measure of damages in a case brought under the Compensation Clause is "independent of any generally awarded adjustment to judicial salaries." App. 125a. Thus, under the court of appeals' decision, a violation of the Clause caused by the application of a tax to judicial salaries continues as long as

[25] Nothing in the circumstances surrounding Congress's extension of the HI and OASDI taxes to judicial salaries suggests that Congress intended to undermine the independence of federal judges. Indeed, Congress has almost doubled federal judicial salaries since 1983. See pp. 6-7, n.6, *supra*. Rather, Congress ensured that judges are treated, for purposes of the Social Security and Medicare programs, in the same way as the 90% of the paid civilian labor force that pays Social Security taxes and accrues eligibility for Social Security and Medicare benefits after retirement. Nor do the HI and OASDI taxes discriminate against federal judges. It is true that, when Congress extended the OASDI tax to all federal employees, it allowed federal employees who were already covered by the CSRS retirement system (see p. 3, *supra*) to choose between coverage under CSRS and Social Security, whereas it did not afford judges that election. Those federal employees, however, were required by law to contribute to the CSRS system, see 5 U.S.C. 8334(a)(1) (1994 & Supp. IV 1998), and so Congress allowed them to "opt out" of Social Security in order to avoid a double deduction. Congress had no occasion to give federal judges a similar election, because federal judges' full-salary retirement annuity, 28 U.S.C. 371(a), requires no salary contribution from judges, but rather is financed out of general tax revenues.

that tax remains in effect, even if Congress subsequently (or perhaps even simultaneously) increases judicial salaries in an amount far greater than the amount of the tax deduction. That ruling cannot be reconciled with the text or policies of the Clause.

The Clause provides that federal judges shall "receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." Even if Congress "diminished" the compensation of sitting judges when it imposed HI and OASDI taxes on their preexisting salaries, that "diminution" surely came to an end when, in 1984, Congress raised those judges' salaries in an amount greater than the incidence of the taxes on their pre-tax salaries. A new tax can only be said to "diminish" a judge's compensation to the extent that it leaves the judge with less compensation than the judge received before the tax took effect. Cf. *Will*, 449 U.S. at 226-229 (holding that Congress did not unconstitutionally diminish judges' salaries when it canceled salary adjustments before their effective date). To be sure, the increase in respondents' net compensation was not so large as it would have been if the HI and OASDI taxes had not been withheld. But the Compensation Clause prohibits Congress only from decreasing judicial compensation; Congress has discretion to decide what increases in compensation should be given. See *id.* at 227.

The court of appeals believed that the Compensation Clause violation continued independent of any general judicial salary increases because, in its view, a different rule would create two classes of judges: those appointed after the taxes were extended to judicial salaries, who would enjoy the full extent of the general salary increases, and those appointed before application of the taxes, who would be required to pay "out of their own salaries, including generally-granted increases, the damages owed to them by the Government." App. 122a. But once Congress increased judicial salaries above the level that existed before the

incidence of the tax, there was no more diminution that required payment of damages. Moreover, the court of appeals' ruling itself creates two classes of judges with different compensation packages: federal judges appointed after the 1984 salary increase took effect must pay HI and OASDI taxes on their current annual salaries, whereas judges appointed before that date receive a permanent immunity from paying those taxes (even though they are eligible for HI and OASDI benefits based on their judicial service). The court of appeals' decision therefore creates serious inequities in judicial compensation.

The effect of the court of appeals' ruling on damages is that Congress may never bring to an end a Compensation Clause violation caused by taxation of judicial salaries except by repealing the offending tax (or, perhaps, by granting the affected judges a special salary increase, thereby compensating them differently from all other federal judges). As a practical matter, that ruling casts a serious cloud on Congress's authority to extend nondiscriminatory taxes, paid by the general population, to judicial salaries. If Congress wants to apply such a tax to judicial salaries, it must grant sitting judges a permanent exemption from the tax.[26] That requirement creates inequities among Article III

[26] The reasoning of the court of appeals' decisions might well prevent Congress from subjecting sitting federal judges to nondiscriminatory increases in the *rate* of taxes such as the income tax and the OASDI tax (and from decreasing deductions and credits applicable to such taxes). If, as the court of appeals concluded, the incidence of a new tax on a pre-existing salary of a federal judge unconstitutionally "diminishes" the amount of a pre-tax salary, then increases in the tax rate might also be said to diminish the amount of the judge's compensation before that increase took effect. But if that is so, then the court of appeals' decision, especially as compounded by its ruling on damages, creates extraordinary difficulties in tax administration. Congress would effectively be required either (a) to freeze the rate of any tax applicable to judicial salaries to the rate in effect when each judge was appointed, or (b) to subject federal judicial salaries only to the lowest income tax rate that was applicable when any sitting member of the judiciary first took office. Nothing in the

judges. Congress could, of course, exempt all judges from new taxes, but that approach creates inequity between Article III judges and all other citizens, as this Court recognized in *O'Malley*, when it made clear that "judges are also citizens" who do not have "an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering." 307 U.S. at 282.[27]

text or background of the Compensation Clause suggests that the Framers intended to relegate Congress to such a welter.

[27] We have not presented as a separate question for review the application of the continuing claim doctrine to the statute of limitations issue in this case; the court of appeals' resolution of that issue will lose its binding and precedential force if this Court reverses the judgment of the court of appeals on either of the questions that we have presented. The court of appeals vacated the initial judgment of the panel when it granted rehearing en banc, App. 129a, and subsequently reinstated a single judgment, reversing the Court of Federal Claims, which resolved all issues before the court on that appeal, App. 1a-2a. It is that judgment that is now presented to this Court for review. Furthermore, the court of appeals decided that respondents could invoke the continuing claim doctrine on the premises that a constitutional violation had been established and that that violation had not terminated when Congress increased judges' salaries after first applying HI and OASDI taxes to those salaries. See App. 7a ("[T]here is merit to the argument of the judges that these periodic deductions, which have been ruled to be unlawful, should be treated as a continuing claim."). But if this Court concludes that either of those premises is incorrect, then there would be no basis for the court of appeals' conclusion that the claimed Compensation Clause violation was the kind that may be asserted as a continuing claim. If this Court reverses the court of appeals on either ground, then the violation (if any) for any respondent would not have continued past 1984, and no respondent could rely on the continuing claim doctrine, whether or not that doctrine might have force in any other setting. See App. 90a (Court of Federal Claims notes that "application of the concept of cure * * * has potential application to a complete resolution" of claims based on the HI tax or brought by later-filing judges), 105a (also noting that, even if the continuing claim doctrine is applicable, those claims "would not result in recovery of damages even if they could be addressed as continuing claims").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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